United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

Court of Appeals of the District of Columbia

DISTRICT OF COLUMBIA
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October Term, 1914.

No. 2718

155

HENRY H. HAZEN, *Appellant*,

vs.

HERMAN W. VAN SENDEN, *Appellee*.

BRIEF FOR APPELLEE

CHARLES POE,
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PRESS OF THE SUDWARTH COMPANY, WASHINGTON

IN THE

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HENRY H. HAZEN, *Appellant,*

vs.

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BRIEF FOR APPELLEE

STATEMENT.

The Appellee sued the Appellant, and one GEORGE N. JESSE, on a promissory note for $1,000, made by the Appellant to the order of said Jesse and by him endorsed.

The suit was brought under the provisions of Common Law Rule, No. 73, and the affidavit of the Appellee, which accompanied his declaration is to be found on page 2 of the record. In it, the Appellee makes oath that both the Appellant and Jesse are indebted to him in the full sum of $1,000, with interest thereon from the 30th day of April, 1914, (the due date of the note), exclusive of all set-offs and just grounds of defense, and he also makes oath that the signatures of the maker and endorser are genuine signatures, that the original note is now in his possession, and that he became the owner and holder of said note before maturity, and is now the holder and owner thereof in the ordinary course of business for value.

It is admitted that the Appellee was in possession of the note and so notified the Appellant at least twelve days before its maturity, though the record is silent as to what reply was made by the Appellant to this notification. The defendant Jesse, who was the payee and endorser of the note, made no defense and judgment was had against him. The Appellant filed the general issue pleas and accompanied them by an affidavit of defense, but, notwithstanding this affidavit, the court below entered judgment for the plaintiff for the face of the note with interest and costs. (Rec., p. 7.) From this judgment the present appeal is taken by the maker of the note. Although several grounds of error are stated, in reality but one question is presented by the appeal, and that is whether the affidavit of defense is sufficient to entitle the Appellant to a trial before a jury. There is no dispute that the Appellee was in possession of the note before maturity, and the presumptions of law are that he was a *bona fide* holder for value in due course of business from the mere fact of such possession. (Code

Section 1363.) All the holder of a promissory note has to do to make out a *prima facie* case is to produce the note and prove the signature. He is then in court entitled to judgment. The authorities cited on the brief for the Appellant are sufficient in support of this simple proposition. The affidavit of defense is supposed to present such a glaring case of fraud by the payee of the note upon its maker as to shift the burden of proof. The affidavit is a very long one, and attempts to set up representations made by Jesse, the payee, to Hazen, the Appellant, at or about the time Hazen made the note to induce him to make it. The representations amount to this: That Jesse told Hazen that he had some stock in an oil development company, the face value of which was $1,500, which had been subscribed for by somebody who had failed to pay for it and that he, Hazen, could buy it for $1,000; that instead of delivering him stock upon which a subscriber had defaulted, Jesse gave him a certificate for stock in the same concern of the face value of $2,000; that Jesse had given nothing for the stock, the certificate for $2,000 which he gave to Hazen, and that if he had known that Jesse had given nothing for it, he, Hazen, would not have given his promissory note for it. The Appellant does not swear that the stock of the defaulting subscriber was of any special or particular value as contradistinguished from the stock which he got from Jesse when he made the note sued on, nor does he say that it was of any greater value than the stock he got. He does say that Jesse paid nothing for his stock, but it is apparent also that the subscriber for the stock which Hazen expected to buy, had paid nothing either, for he had defaulted in his payment and Jesse so told Hazen. Nowhere does Hazen in his affidavit say that the stock which Jesse gave him and which was $500 more than Hazen had agreed to buy, was of no value. He merely swears that Jesse had given nothing for it. The affidavit is careful to refrain from making such an averment, the only grievance averred being that Jesse paid nothing for it, and that if Hazen had known that Jesse had paid nothing for it Hazen wouldn't have given his promissory note to Jesse. He knew the defaulting subscriber had paid nothing for his $1,500 worth of stock, and yet he was willing to give his note for that, so it is not quite plain how he has been defrauded by being given $2,000 worth of the same kind of stock for which Jesse had paid nothing. It is apparent, from Hazen's affidavit, that the whole project of The Equitable Oil & Development Company was an experiment at best, for Hazen swears that Jesse told him "that the company only needed $1,000 to enable it to commence drilling operations." It is manifest then that when Hazen agreed to go into the matter, he agreed to go into a *venture;* into the purchase of stock in an oil development company which had never begun operations.

Argument is made on behalf of Appellant that Appellant was deceived by an imaginary suppression of the facts of the condition of the treasury of the company by Jesse. It is contended that because Jesse told the Appellant that the company only needed $1,000 to commence drilling operations that Jesse thereby suppressed the fact that the company was not an opulent company with its treasury bursting over with funds. It is respectfully submitted that such an argument is fallacious. The inference, on the contrary, is overwhelming that Jesse meant to tell, and did tell the exact truth. If Hazen knew that Jesse was selling him the stock upon which a subscriber had defaulted, and was willing to take payment in his promissory note; if he was a sensible man at all, he must have known that that was not because the company was rich, but because it was poor, and I might say here, in passing, that if he didn't know he was buying Jesse's stock, why did he give his note to Jesse instead of giving it to the company? Of course, Your Honors will bear in mind that for the purposes of the present argument we are assuming the truth, as we have to do in such a discussion, of all the facts set up in the affidavit of defense, keeping in mind, however, always that the grounds, if true, would be sufficient to defeat the plaintiff's claim, and bearing in mind always that this is a suit by a plaintiff conceded to be the holder of a promissory note before maturity, which came to him by endorsement in blank. Let us proceed further with the affidavit of defense, bearing in mind always that it relates entirely to the dealings between the maker of the note and the payee at the time and out of the presence of the holder, which stated:

> "I handed my said note to said Jesse and as an inducement thereto, upon the faith of which I gave my said note, he promised and agreed as a part of the transaction, and to save me harmless should the stock not prove a profitable investment, to deliver to me a deed to certain lots in Rosedale Park * * * at the same time stating to me that said real estate was then subject only to an encumbrance of about $166 and further that he, Jesse, had paid cash for the land and had paid off everything except this little trust."

The affidavit then goes on to say that Jesse then knew that said land in Rosedale Park was subject to an encumbrance of $6,000 on said lots, *together with other lots.* He goes on to say that Jesse did send him a deed for this purpose, but he doesn't state whether he accepted and recorded said deed or not, nor does he tell how many "other lots" were embraced in the sub-division known as Rosedale Park, or what proportion of the trust apparent upon the record had been paid off, nor what proportion of said trust might be paid off in order to have the lots conveyed to him, be actually liable to only the sum of $166. This important fact, if divulged, might have a great bearing upon the question as to whether Jesse obtained the note from the Appellant by such a fraudulent practice as to make it defective in the hands of a person who got it by endorsement before maturity.

So much for the affidavit, as far as it relates to the transaction alleged to have taken place between the Appellant and the payee of the note. Now, as to the affidavit with reference to the facts expected to be proven as to the *bona fides* of the appellee and the value which he gave for the note. Hazen swears that after the suit was brought, and, of course, after the Appellee had taken his solemn oath that he was a *bona fide* holder in due course and for value, he sent his lawyer to Van Senden's lawyer to demand of him what consideration Van Senden had given Jesse for the note, and that this request was denied. The affidavit then proceeds with the long statement of what the Appellant believes, *not what he expects to prove at the trial,* and it must be apparent to the court that the grounds of his belief are suspicions entertained, and not facts which he expects to establish by witnesses. He speaks of investigations which he has made, doesn't tell the court their nature or extent, and he then proceeds to charge Jesse with such uniform iniquity as to practically excommunicate him and to brand him as a person with whom it is unsafe to deal, while he is, in point of fact, a reputable member of the Bar. This is the language of that part of the affidavit:

"that I verily believe from all the facts and circumstances that have come to my notice, including the plaintiff's refusal to acquaint me with the consideration claimed to have been given by him, that said Jesse and the plaintiff are acting in collusion in the prosecution of this suit against me, and that the plaintiff is lending himself, for a consideration, toward helping said Jesse extort from me, by and through the plaintiff, a recovery on said note, which said Jesse could not himself secure, by reason of his fraud and the failure of consideration; that my said belief is further borne out by the fact, as I am credibly informed and believe, and expect to prove at the trial, that the plaintiff and said Jesse are intimate friends and constant associates, and have been so for a great many years, further that said Jesse has been largely engaged during all of said period in perpetrating frauds in connection with various stock enterprises, and that the plaintiff during all of said period was well aware of the fact that the perpetration of frauds constituted to a large extent Jesse's business, notwithstanding which knowledge the plaintiff did not communicate with me in any way before his alleged acquisition of my promissory note, which acquisition he claims, as I am informed and believe, occurred just after the note was given in the Fall of 1913; that the first communication, oral or written, received by me from the plaintiff on the subject was shortly before this suit was brought, and consisted of a letter dated April 18, 1914, reciting:

" 'I am the owner of a note made by you to the order of George N. Jesse, on October 30th last, due in six months after date. This note will mature on April 30th, and the amount due on the day of maturity will be $1,030.00.' "

I submit that the Appellant, even if he should prove that he believed these facts, would not bring himself within the language of the 73d Rule, which requires * * * *

> "an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part."

While the brief of counsel for Appellant seems to establish quite an industrious research by him, he seems not to have discovered the case which controls this (Hutchins vs. Langley, 27 D. C., Appeals, 234.)

It appears to me that the question in dispute in this case was put at rest by the decision of this court in that, from which I make the following extracts:

> "The position of the holder of negotiable paper for value is a strong one, and he cannot be displaced by mere circumstances of suspicion growing out of the unpopular business, or even the ill reputation of his assignor. (Following Brewer v. Slater, 18 App. D. C., 56.)
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> "A party who takes negotiable paper before maturity for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. This result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title.
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> "Fraud in obtaining a note given in payment for stock is not sufficiently proved where it appears that the payee promised to return the note under certain conditions, and never to use it as collateral security,

> except in a certain locality; both of which promises he failed to keep. In such a case a *bona fide* holder for value may recover on the note against the maker. (Citing Green v. Stewart, 23 App. D. C., 570; Brown v. Petersen, 25 App. D. C., 359.)"

On page 240, of the opinion in that case, Your Honors will observe that you have distinguished cases like the one at bar from those cited on the brief for the Appellant. The case of Codington v. The Standard National Bank, 40 Appeals D. C., 409, seems to be somewhat relied upon in support of the error assigned, but Your Honors, upon an inspection of the *Record* in that case, will find that that was a case where the defense set up was that the note sued upon came into possession of the plaintiff after maturity for collection, and specifically alleged knowledge on behalf of the plaintiff bank of the circumstances concerning the making of the note, and that the bank itself had taken security for its own protection. This was also alleged and proven in the case of the First National Bank v. Fox, 40 Appeals D. C., 430. These cases are readily distinguishable from the case at bar.

While the amount involved in this case is not so very great, the question is exceedingly important as affecting the rights of holders of commercial paper. I submit that the judgment was correct, and should be affirmed.

CHARLES POE,

Attorney for Appellee.